may show that what he did is, in his case and as an exception to the general law, not a criminal offence.

The direction which, in the present case, the learned trial Judge gave to the jury was the following:–

"It is correct, as the learned Deputy Public Prosecutor has told you, that the proof of such a statutory defence is on
[180] the [180] person who sets the defence up, and it is, of course, difficult for a man who sets up an *alibi* to try and prove such a set of circumstances when presumably, he was not there. He is, of course, at liberty to try and prove his case from the evidence which is called for the prosecution."

This direction was in accordance with the law of this Colony and is not open to objection. This ground of appeal, therefore, also fails.

A third question was that which was raised in the eighth ground of appeal, which alleged mis-direction on the question of common intention. This Court recently considered this question in the case of *R.* v. *Banka & Anor.*, [1936] M.L.J. 66, *supra* p. 53, where the terms of section 34 of the Penal Code were summed up in the following phrase: "Under the terms of that section . . . there must exist a common intention to commit the crime actually committed, and it is not sufficient that there should be merely a common intention to 'behave criminally'." That does not, of course, mean that, in the case of murder, there need have been a common intention actually to kill; but there must have been a common intention to do any of the acts which are described in sections 299 and 300 of the Penal Code and the doing of which, if death results, amounts to murder.

The passages in the summing-up which Mr. Taylour has sought to criticise are to be found at pp. 167 and 168 of the shorthand note. Mr. Taylour's criticism was really based on the hypothesis that the deceased may have been the first to use a firearm and that each of the accused and his companions may then have used his pistol as a result of that provocation and not of any pre-conceived design. This hypothesis, however, finds no support in the evidence. There is no evidence that the deceased was armed; all the evidence, on the contrary, supports the view that he was not. The evidence as a whole suggests one thing only and that is a joint unprovoked and murderous attack upon the deceased by the accused and his companions. To borrow a phrase from the judgment of the Court of Criminal Appeal in England, in the recent case of *Rex* v. *Waddingham*, "The argument of counsel for the appellant really amounted to the contention that the Judge, exercising a scientific imagination, ought to have conjectured that the jury might conceivably invent a new case which was not supported by a tittle of evidence."

On the evidence which was before the jury the summing up of the learned trial Judge is not open to any substantial criticism in respect of the points raised by counsel for the appellant. On p. 168 of the shorthand note the word "probably" may be an error in transcribing the shorthand sign for "fired" and one or two of the sentences, as transcribed, are none too clear, but these also may contain errors in reporting due to poor acoustics. We are satisfied that the directions to the jury were substantially correct and should not have misled them in the consideration of their verdict.

This Court dealt with the facts of this case when delivering its oral judgment dismissing the appeal. It was never suggested in argument before us that the acceptance by the jury of the identification of the accused could successfully be attacked; it was only faintly suggested that the jury were wrong in rejecting the *alibi;* and once the evidence of Mr. Shuat and of Osman bin Babji was accepted as being substantially accurate there was ample justification for the unanimous verdict of the jury that the accused was guilty of murder.

Appeal dismissed.

Solicitors: *John G. Campbell & Co.*

MRS. J. A. PEREIRA v. SINGAPORE IMPROVEMENT TRUST

[Special Jurisdiction under Singapore Improvement Ordinance (L. B. Gibson D.J.) May 11, 1936]

[Tribunal Reference No. 1 of 1936]

Singapore Improvement Ordinance, 1927, s.105 — Injurious affection.

A piece of land was injuriously affected by the approval of a plan under section 52 of the Singapore Improvement Ordinance. The owner made no claim for compensation within the time limited by section 105 of the Singapore Improvement Ordinance. More than three years later the Government of the Straits Settlements proceeded to acquire part of the land for the Singapore Improvement Trust for road widening purposes, acting under Ordinance No. 49 (Land Acquisition). Thereupon the owner made a claim not only for the part of the land acquired but also for injurious affection had in fact been suffered at the time of the approval of the plan.

Held: that the right to claim for injurious affection under section 105 of the Singapore Improvement Ordinance had gone and could not be revived. Compensation for injurious affection could now only be claimed under section 25(1)(d) of Ordinance No. 49 if the depreciation of the value of the property consequent upon the acquisition exceeded the amount which could have been claimed under section 105 of the Singapore Improvement Ordinance on the approval of the plan.

Also held: that when land is acquired by the Government for the Singapore Improvement Trust under section 42A of the Singapore Improvement Ordinance the provisions of Ordinance No. 49 apply to the exclusion of section 113 of the Singapore Improvement Ordinance.

Also held: that upon a reference to the Tribunal under section 42A, subsection 3 the reference is as to the [181] whole [181]
question of the compensation payable, not merely as to such part of an award as may have been appealed against.

TRIBUNAL REFERENCE.

On the 16th April, 1932 the Singapore Improvement Trust submitted to the Governor in Council under section 51 of the Singapore Improvement Ordinance a plan prepared by them known as Addition No. 18 of 1931 to the General Improvement Plan of Singapore. The Plan showed a proposed regular line of street for Upper Serangoon Road, Singapore which involved a road widening. Lot 15^{20} of Mukim 22 (containing a total area of 6,254 sq. ft.) abutted on Serangoon Road and was affected by the plan as the front part of the land would be required for road

widening purposes. A compound house stood upon this lot, such house being built about 48 feet backwards from Serangoon Road. Of this 48 feet the plan showed that 30 feet would be required for the road widening. On the 6th June, 1932 the Governor in Council approved the plan and such approval was notified in the Straits Settlements Government *Gazette* on the 17th June, 1932 in accordance with sub-sections 3 and 4 of section 52 of the Singapore Improvement Ordinance. No claim was made by the appellant for injurious affection under section 105 of the Singapore Improvement Ordinance within three months after the date when the approval of the plan was notified under section 52 and indeed no claim at all was made in respect of injurious affection save as hereinafter mentioned.

On the 6th August, 1935 the Governor in Council made a declaration under section 42A, subsection 2 of the Singapore Improvement Ordinance declaring that it appeared that certain pieces of land mentioned in the declaration including lot 15[20] of Mukim 22 were required for a public purpose, namely, for the widening of Serangoon Road and ordering that proceedings for acquiring and obtaining possession of the said land for the Singapore Improvement Trust be taken. Accordingly proceedings were taken under Ordinance No. 49 (Land Acquisition). The Collector held an enquiry on the 20th September, 1935. At this enquiry the appellant made a claim for injurious affection. On the 4th October, 1935 the Collector made an award which included nothing for injurious affection. Thereupon the appellant required the Singapore Improvement Trust to refer the matter to the Tribunal for the determination of the amount of the compensation payable to the appellant. The reference to the Tribunal came on for hearing on the 21st April, 1936 before a Tribunal consisting of the District Judge (Mr. L. B. Gibson) and two assessors, Mr. E. S. Manasseh and Mr. H. C. Atkin Berry.

H. R. S. Zehnder for the appellant. The widening of the road will bring the road within 17 feet of the appellant's house and will greatly damage the amenities of the house. This injurious affection was not considered by the Collector when making his award and nothing has been included in the award in respect thereof. The road widening strip is being acquired under Ordinance No. 49 (Land Acquisition). Under section 25(1)(d) of that Ordinance injurious affection to other property of the appellant must be taken into consideration. The date at which the valuation of the property is to be made is the date of the publication of the declaration made under section 5 as provided by section 25, subsection 1(a) of Ordinance No. 49. Section 105 of the Singapore Improvement Ordinance does not apply unless the Improvement Trust acts under section 106 of that Ordinance. Section 113 of the Singapore Improvement Ordinance does not apply where proceedings are taken under Ordinance No. 49, but only where the Trust acts under section 106 of the Singapore Improvement Ordinance.

The appellant's husband and attorney gave evidence and admitted that the property had suffered injurious affection in 1932 by reason of the approval of the plan. He admitted that the publication of the plan depreciated the value of the property in 1932 and he stated that the reason why no claim had been made in 1932 was his ignorance of the law. He stated that if he had known the law he would have made the same claim in 1932 as he was then making and he admitted that the depreciation in value or injurious affection was the same in 1932 as in 1935.

Laycock for the Singapore Improvement Trust. The plaintiff's attorney admits that injurious affection was suffered in 1932 and that as regards quantum there was no additional injurious affection in 1935. The appellant could have made a claim in respect of injurious affection in 1932 under section 105 of the Singapore Improvement Ordinance if she had done so at the prescribed time, namely, three months after the date when the approval of the plan was notified. She failed to do so and therefore her right to claim lapsed. Such a right having once gone could not be revived. The property had already depreciated in value three years before proceedings were taken for acquisition under Ordinance No. 49. In an acquisition under that Ordinance the Collector or the Court could only take into consideration the value of the property at the time when the proceedings for acquisition under Ordinance No. 49 were commenced. They could not go back to any anterior period. If the proceedings under Ordinance No. 49 had caused additional injurious affecting (beyond what was caused by the passing of the plan) such additional injurious affection would be a proper subject-matter for compensation under Ordinance No. 49; but in this case it was admitted that there was no additional injurious affection. Injurious affection means in [182] effect depreciation in market value of the property, money deterioration: *Duke of Buccleuch* v. *Metropolitan Board of Works*, 5 H.L. 418; *Sisters of Charity of Rockingham* v. *The King*, [1922] 2 App. Cas. 310. Prices awarded in other compulsory acquisitions in the neighbourhood can be considered. This being a reference to the Tribunal the whole matter is in issue and the Tribunal can if it desires reopen the question of the valuation of the land. [182]

Zehnder in reply: I admit that section 105 of the Singapore Improvement Ordinance originally applied and that the claimant could have made a claim within three months after notification of approval of the plan and thereafter the claimant's right died. This right however was revived when proceedings were taken under Ordinance No. 49. The award as to the value of the land taken has been accepted by the claimants and by the Trust and the reference to the Tribunal is as to injurious affection only and this is the only matter that the Tribunal can now consider.

Cur. Adv. Vult.

The District Judge, Mr. L. B. Gibson, gave an oral direction or charge to the Assessors directing them on the law in the course of which he said:—

L. B. Gibson D.J.: I hold that when land is acquired by the Government for the Singapore Improvement Trust under section 42A of the Singapore Improvement Ordinance the provision of Ordinance No.

49 particularly of sections 25 and 26 apply to such acquisition to the exclusion of section 113 of the Singapore Improvement Ordinance. I also hold that when there is a reference to the Tribunal under section 42A(3) of the Singapore Improvement Ordinance the whole matter is in issue and the Tribunal in valuing the land and in determining the matter is bound to consider not merely any matter specifically appealed against but the whole question of compensation as it is the whole matter which is referred by the Board for the determination of the Tribunal. I hold that prices at previous forced sales and prices awarded or paid on similar compulsory acquisitions and also the prices awarded by the Collector in respect of adjacent properties in connection with this group of acquisitions can be taken into consideration by the Tribunal. Any special adaptability of the property for any purpose, e.g. as shophouses can be taken into consideration in so far as it affects market value. The appellant obtained a right to claim compensation for injurious affection under section 105 of the Singapore Improvement Ordinance on the notification of approval of the plan in 1932. As that right was not exercised in time the right to claim under that section has gone. The Tribunal has no power to extend the time. In a case like this Ordinance No. 49, section 25, subsection 1(b), (c), (d) and (e) must be considered in conjunction with section 105 of the Singapore Improvement Ordinance read along with sections 106 and 113 of that Ordinance. As injurious affection was suffered in 1932 and as no claim was then made compensation in respect of injurious affection is only claimable now under section 25, subsection (1)(d), if any injurious affection has been suffered over and above what could have been claimed in 1932 under section 105 of the Singapore Improvement Ordinance.

Award confirmed.

Solicitors: *Zehnder Bros.; Braddell Bros.*

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[183] F.M.S. REPORTS

PHOON CHONG v. PUBLIC PROSECUTOR

[A. Cr. J. (Whitley Ag. C.J. (S.S.), Howes and Aitken JJ.) March 23, 1936]

[Pahang Criminal Appeal No. 1 of 1936]

The Criminal Procedure Code (Cap. 6), s.197 — Retirement of assessors and consultation between them before giving their opinions — Opinion expressed by Judge in summing up the evidence.

Although section 197 of the Criminal Procedure Code (Cap. 6) does not state whether or not assessors should be allowed to retire, there is no reason why the Judge, in his discretion, should not allow them to do so and it may be advantageous and even desirable that assessors should have the opportunity of discussing the matter with one another.

Section 197, which allows the Judge to sum up the evidence for the prosecution and the defence to the assessors, must also be taken to empower the Judge to express his opinion on any part of the evidence, provided that he directs the assessors that they are not to be influenced unduly by his opinion; that they must come to their own personal conclusions; and that if either of them differs from the Judge in the view which he has expressed as to any part of the evidence, it is the view of the assessors which should prevail.

COURT OF APPEAL (CRIMINAL).

P. Storr for the appellant.

C. H. Whitton (Deputy Public Prosecutor) for the respondent.

Whitley Ag. C.J. (S.S.): The Court is of opinion that this appeal must be dismissed. We have listened with great interest to the able arguments put forward by Mr. Storr on behalf of the appellant, in particular to two points arising out of the wording of section 197 of the Criminal Procedure Code, dealing with the procedure at a trial with assessors which apparently have never been taken before.

The first point which he raised was that in section 197 there is nothing to provide for the retirement of the assessors or for consultation between them, and by reason of that fact, he contends that it is illegal for the assessors to be allowed to retire and confer at the conclusion of the case before giving their opinions. He pointed out that in that part of the Code which deals with procedure at trials by jury, special provision is made for the jury being allowed to retire, and he argues that because no such provision is made in the section which deals with the trial with assessors, it follows that the legislature in framing that section did not intend that the assessors should be allowed to retire. He relied upon the case of *King-Emperor* v. *Tribunal Reddi and others,* I.L.R. 24 Mad. 523. But it appears to us on considering the judgment in that case that the learned Judge was to a large extent expressing opinions which are *obiter.* The facts in that case as to the retirement of the assessor were entirely different from those in the case which we are now considering. In that case one assessor absented himself from proceedings with the permission of the Court every day in order to attend some funeral ceremonies, and when he came back he was allowed to sit as assessor again, and the notes of the proceedings which had taken place during his absence were read over to him. That case as Mr. Storr admits is different from the present one, but he contends that the principle laid down by the learned Judge in that case should be applied here.

We are of opinion that the view which should be taken is that which was taken by another Indian Court in a later case in India reported in XVI Cr. L.J. 717 (M) which is quoted in *Sohoni's* Criminal Procedure Code, 13th edn., at p. 735. The extract reads as follows:—

> "Is a consultation between the assessors allowable? We cannot find in the Code any provision authorising or forbidding the Judge to allow consultation between the assessors and although we are not prepared to decide that the Judge may not in his discretion do so, we follow the opinion of Bhashyam Ayyangar J., expressed in 24 M. 523 to the extent of holding that he is entitled to have before him each assessor's individual and independent opinion."

This Court takes the same view as regards what should be the procedure here, and although there is nothing specifically laid down in the section as to whether or not assessors should be allowed to retire, we can see no reason why the Judge in his discretion should not allow them to do so. We also agree that the Judge is entitled to have before him, after they